In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO. } No. 235.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is brought from the circuit court of appeals for the second circuit by a writ of *certiorari*. It is one of 27 similar pending cases growing out of the Sumatra

leaf tobacco controversy, and involving, altogether, over $691,000. Two questions are raised:

First. A question of procedure under the customs administrative act of June 10, 1890 (26 Stat., 131, ch. 407), being the nature and effect of the application to the circuit court for a review under section 15. (See Appendix.)

Second. A question of classification—the classification of leaf tobacco under paragraphs 246 and 247 of Schedule F, of the tariff act of March 3, 1883 (22 Stat., 488, 503, ch. 121), which read as follows:

> 246. Leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.
>
> 247. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound.

The character of the merchandise and the action of the collector is set forth in the following stipulation of counsel (Rec., pp. 16, 17):

> The entry for warehouse of the merchandise in question bears date *June 30, 1890*, and covers *two lots of Sumatra leaf tobacco not stemmed:* One lot marked "L. & Co., Nos. 101/192," 92 bales, and the other lot the same marks, Nos. 193/410, 218 bales, making an aggregate of 310 bales. Attached to said entry is the official weigher's special re-

turn of the merchandise, duly made by J. Jardine, United States weigher, dated July 19, 1890, giving the gross weight of the tobacco, the actual and schedule tare, and the net weight of the tobacco; and on the back of said weigher's return appears a further return, showing the weight and tare of each and every one of the 310 bales of tobacco involved.

The invoice in evidence of the merchandise is in the German language, and is dated at Amsterdam, June 13, 1890, and is to Messrs. George P. Lies & Co., of New York, covering 310 bales of Sumatra tobacco, by the marks and numbers as stated in the foregoing entry, the gross weight and the tare being given in kilograms. This invoice was duly certified before the United States consul at Amsterdam, and upon the face of the invoice appears the return, in red ink, of the United States examiner at the port of New York: "Leaf tobacco, not stemmed, 35c. and 75c. Pars. 246 and 247, T. I. new." *And on the back of said invoice appears in red ink the numbers of the bales of tobacco examined by the appraiser, with the note,* "*Thirty-nine bales, as noted as per memo. attached, balance classified.* July 19/90. C. H. R. D. F. Burke." And underneath, in blue ink, "Approved, M. W. Cooper, appraiser." Attached to the invoice appears the following *table of returns made by Mr. Charles H. Roberts, United States examiner, of the bales ordered to the public store by the collector for examination and the percentage of each examined bale returned by the appraiser as dutiable at*

35 cents and at 75 cents per pound, respectively, which list is as follows:

Lots.	Plantation length and color marks.	Bales ordered for examination.	Percentage.	
			35cents.	75cents
L. & C. 101/5	B B 1	105	80	20
106/13	V 1	106	.....	100
114/16	G 1	116	70	30
117/22	S 1	117	60	40
123/52	S L 1	123	20	80
	S L 1	133	60	40
	S L 1	143	60	40
153/63	S S 1	153	100	.....
	S S 1	163	90	10
164/92	S S L 1	164	30	70
	S S L 1	174	10	90
	S S L 1	184	60	40
193/224	B B 1	193	100	.....
	B B 1	203	100	.....
	B B 1	213	90	10
	B B 1	224	90	10
225/27	L 1	225	.....	100
228/49	L 1	228	60	40
	L 1	238	70	30
288/49	V 1	249	40	60
250/54	G 1	250	50	50
255/62	K 1	262	20	80
263/84	S 1	263	100	.....
	S 1	273	90	10
	S 1	284	100	.....
285/337	S L 1	285	90	10
	S L 1	295	30	70
	S L 1	305	60	40
	S L 1	325	60	40
	S L 1	337	60	40
338/59	S S 1	338	100	.....
	S S 1	348	90	10
	S S 1	359	70	30
360/410	S S I 1	360	80	20
	....do ...	370	60	40
	....do ...	380	20	80
	....do ...	390	90	10
	....do ...	400	80	20
	....do ...	410	60	40

July 19/90. C. H. R.

The tobacco was of uniform grade, and the examination of the representative bales by the Government officer was made by drawing not less than ten "hands" from each bale, the hand consisting of a

certain quantity of leaves tied together by the stems. The collector classified the tobacco according to the percentages returned by the appraiser, dividing the examined bale and the lot represented by such bale into corresponding percentages of 75-cent and 35-cent tobacco.

It will be observed that the invoice covered 310 bales of Sumatra tobacco. Sumatra tobacco is wrapper tobacco, and the stipulation shows that all this tobacco "was of uniform grade." Of this invoice the collector designated for examination 39 bales. The lots represented by the bales thus ordered for examination are indicated in the foregoing table. There were in all 17 lots, represented by 39 bales.

Lot No. 1, of 6 bales, was represented by 1 bale;
Lot No. 2, of 8 bales, by 1 bale;
Lot No. 3, of 3 bales, by 1 bale;
Lot No. 4, of 6 bales, by 1 bale;
Lot No. 5, of 30 bales, by 3 bales;
Lot No. 6, of 11 bales, by 2 bales;
Lot No. 7, of 19 bales, by 3 bales;
Lot No. 8, of 32 bales, by 4 bales;
Lot No. 9, of 3 bales, by 1 bale;
Lots 10 and 11, of 22 bales, by 3 bales;
Lot 12, of 5 bales, by 1 bale;
Lot 13, of 8 bales, by 1 bale;
Lot 14, of 22 bales, by 3 bales;
Lot 15, of 53 bales, by 5 bales;
Lot 16, of 22 bales, by 3 bales;
Lot 17, of 51 bales, by 6 bales.

The examiner drew from the representative bale not less than ten hands, the hand consisting of a certain

number of leaves tied together by the stems. He ascertained by inspection of the leaves whether the tobacco was of the requisite size and fineness required for wrappers. As appears by the stipulation referred to, all leaves in all the hands examined were of the size and fineness of texture required for wrappers, the tobacco being "of uniform grade." This is usually the fact, as in the *Blumlein Case* (49 F. R., 228, 231), and *Rosenwald Case* (67 F. R., 323, 325). [See Appendix.] Having by inspection ascertained that the tobacco was of the size and texture required for wrappers, the examiner then weighed the hands separately to ascertain whether the leaves ran over or under one hundred to the pound, and divided the hands into two classes, one consisting of those in which the hands ran more than one hundred to the pound, and the other of those in which they ran less. So many tenths of the bale as there were hands of the former class were returned as dutiable at 75-cents per pound, and so many as there were hands of the latter class were returned as dutiable at 35 cents a pound.

This appears from the last two columns headed "percentage." Thus, of the ten hands drawn from the bale representing lot 1 consisting of 6 bales, two of the hands were made up of leaves running more than one hundred to the pound, and eight of the hands of leaves running one hundred or less to the pound. Twenty per cent of the representative bale, and, therefore, of the lot of 6 bales for which it stood, was regarded as 75-cent tobacco, and 80 per cent as 35-cent tobacco. This method was followed throughout. "The collector classified the tobacco according to the percentages returned by the

appraiser, dividing the examined bale and the lot represented by such bale into corresponding percentage of 75-cent and 35-cent tobacco." (Rec., bottom p. 7.)

Against this action of the collector in classifying the tobacco and fixing the rate and amount of duties chargeable upon it, the importers protested under the fourteenth section of the customs administrative act. The protest contains twenty-four grounds of objection, is voluminous and comprehensive, evidently intended to anticipate and cover every possible construction of paragraphs 246 and 247 that the courts might make. (Rec., pp. 5 to 8, inclusive.)

In his letter transmitting to the Board of General Appraisers the protest, invoice, and all papers and exhibits, the collector stated (Rec., bottom p. 4):

> I have to state that the appraiser reported that a certain portion of the tobacco included in the above importation was of the requisite size, fineness of texture, etc., to be suitable for wrappers, and *upon that portion only* duty was assessed at the rate of 75 cents per pound under the provisions of T. I. new 246, S. 7350, 8299, and 8368.

The protest was transmitted by the collector to the Board of General Appraisers September 13, 1890, but the decision of the board on the matter was not rendered until July 18, 1893. Meantime, on April 18, 1893, the *Blumlein Case* [see appendix] was decided by the circuit court of appeals for the second circuit (55 F. R., 383). In this case it was held that the unit in classifying tobacco under paragraphs 246 and 247 of the act of March 3, 1883, is the bale, and that the 85-per-cent clause refers to weight as well as size and fineness; in other words,

under this decision, a bale of unstemmed leaf tobacco is dutiable at 75 cents per pound if 85 per cent of it is of the requisite size, fineness, and weight, under paragraph 246.

Following the *Blumlein Case*, the Board of General Appraisers decided as follows (Rec., p. 9):

> The United States circuit court of appeals recently decided in the case of Blumlein, and we so hold in the cases now under consideration, that *the bale is the unit*, and that a bale of leaf tobacco, of which 85 per cent is of the requisite size, fineness, *and weight*, is dutiable at 75 cents, and when there is a less percentage at 35 cents, per pound.
>
> A point which the court did not feel called upon to decide, but which is raised in the protests before us, and which is now raised by the appellants, is that no bales of tobacco other than those actually opened and examined by the appraiser, and found to contain more than the requisite 85 per cent, are liable to a higher rate of duty than 35 cents a pound.
>
> We are of the opinion that *an examination of one bale in ten*, of plantation lots, *is a fair and lawful examination* of merchandise, and is in accordance with section 2901, Revised Statutes. While such an examination might not furnish a precise description of the goods, there is no reason to suppose that it would not be as favorable to the importer as to the Government.
>
> It is difficult, it is true, to decide just what bales are represented by the bales examined, inasmuch as the bales ordered to the public stores were not selected serially from decades.
>
> *In the absence of the merchandise and of any evidence to impugn the returns of the appraiser, or to show the character of the tobacco, we find that the*

> *returns were correct*, and, in accordance therewith, we hold that in the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent or less of wrapper tobacco.
>
> To this extent the protests are sustained. Otherwise the decisions of the collector are affirmed.

The decision overruled a number of objections in the protest. It sustained the sufficiency of the examination made under the direction of the collector, and the correctness of the returns of the appraiser showing the character of the tobacco. The erroneous part of this decision, as now viewed by the Government, is the holding that—

> In the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent or less of wrapper tobacco.

The result of this decision and order is that all the tobacco classified by him as 75-cent tobacco, according to the percentage columns in the foregoing table, must be reduced and classified as 35-cent tobacco, except where the last column, headed 75 cents, shows 90 per cent or more of 75-cent tobacco. In other words, under the method pursued by the examiner, nine hands must have been tobacco running over 100 leaves to the pound in

order that the bale and the lot it represented should be classified as 75-cent tobacco. There were only three bales of that sort examined. The representative bale of lot No. 2, consisting of eight bales, of which 100 per cent or ten hands was 75-cent tobacco; one of the three representative bales of lot 7, consisting of 19 bales, contained 90 per cent or nine hands of 75-cent tobacco; the representative bale of lot 9, consisting of three bales, contained 100 per cent or ten hands of 75-cent tobacco.

Of the 39 bales examined, representing the invoice of 310 bales, but 3 bales contained at least nine hands of 75-cent tobacco. The other 36 representative bales contained each only eight hands or less of 75-cent tobacco, and therefore they and the lots they represented were ordered classified by the Board of General Appraisers as 35-cent tobacco.

The importers, being dissatisfied with the decision of the Board of General Appraisers, on August 15, 1893, under section 15 of the customs administrative act, filed an application (Rec., pp. 1 and 2) in the circuit court "for a review of the questions of law and fact involved in such decision," claiming that the Board of Appraisers erred:

First. As a matter of fact in finding that the returns of the local appraiser as to the character of the tobacco were correct.

Second. As a matter of law—

In holding that an examination of one bale in ten of a plantation lot of tobacco is a lawful examination;

In holding that any portion of the tobacco except the bales actually examined was dutiable at more than 35 cents per pound;

In affirming in any particular the collector's decision, so far as the same operated to impose a duty of 75 cents per pound on any of the tobacco;

In holding that in the reliquidation the lots must be prorated according to the return of the appraiser.

The prayer of the application was as follows (Rec., p. 2):

> Accordingly, your petitioners respectfully pray the court to order the said Board of General Appraisers to return to the court the record and evidence taken by the said board, together with a certified statement of the facts involved in the above case, and of its decision thereon; and thereupon, and upon such further evidence as may be hereafter taken pursuant to the statute in such cases made and provided, *to proceed to review said decision, and to determine the questions of law and fact involved in same.*

The fifteenth section of the customs administrative act [see appendix] provides that after the filing of the application for review—

> The court shall order the Board of Appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon; and all the evidence taken by and before said appraisers *shall be competent evidence* before said circuit court.

This section further provides that within twenty days after such return is made, the court may, upon application—

> Refer it to one of said general appraisers, as an officer of the court, to take and return to the court

> *such further evidence* as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and *such further evidence, with the aforesaid returns, shall constitute the record* upon which the said circuit court *shall* give priority to and *proceed to hear and determine the questions of law and fact involved* in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector or person acting as such shall liquidate the entry accordingly.

In accordance with these provisions, and on motion of the importers, the court, on August 15, 1893, ordered the Board of Appraisers to "return to this court the record and evidence taken by them, * * * together with certified statement of the facts in the case and their decision thereon." (Rec., bottom p. 3.)

This was done, and *on October 7, 1893*, on motion of the importers, the court ordered:

> That the above-entitled matter be, and the same hereby is, referred to General Appraiser George H. Sharpe, to take and return to this court such further evidence as may be offered in said matter. (Rec., middle p. 10.)

In this situation, with the case referred to General Appraiser Sharpe to take and return such further evidence as might be offered, the matter was allowed to rest pending the decision of the case of *Erhardt* v. *Schroeder* (155 U. S., 124). [See Appendix.] This case was decided November 12, 1894. In it this court held:

First. That the burden is not upon the Government

to sustain the action of the collector in classifying such tobacco by showing his return was correct, but, on the contrary, upon the importers to overrule his action by showing that the return was incorrect.

Second. That in classifying tobacco under paragraphs 246 and 247, when of uniform grade and quality, the bale may properly be regarded as the unit, and the 85-per-cent test applies only to the size and fineness of texture of the leaves, the weight test being applicable to the average weight of the leaves in the bale; in other words, a bale of Sumatra tobacco of uniform grade is dutiable at 75 cents a pound if 85 per cent of it is of the size and fineness of texture requisite for wrappers, and if, on the average, the leaves in the bale run more than one hundred to the pound.

The court held that, in examining the tobacco, separate hands taken from a bale containing only leaves of one class, must not be treated as units, but that the hands should be separated and the statutory test applied to the general collection of all the representative leaves irrespective of their casual association in the separate hands. (155 U. S., 134.) Applying this to the weight test, if ten hands should be taken as a representative of a bale, and those ten hands should weigh 4 pounds, then the ten hands must contain more than 400 leaves. (155 U. S., 136.)

The *Schroeder Case* was decided November 12, 1894, but still the importers did not act on the reference to General Appraiser Sharpe. They awaited the decision of the circuit court of appeals in the *Rosenwald Case* (67 F. R., 323) [see Appendix], in which the importers were represented by the counsel who appear in the present case.

Finally, on March 5, 1895, the *Rosenwald Case* was decided. The court, following and applying the *Schroeder Case*, held that when the tobacco is of uniform grade and quality the bale is the unit, and the presumption being in favor of the correctness of the classification of the collector, the burden rests upon the importer to show that it is not correct. It therefore reversed the circuit court and sustained the collector, because the importer had not shown his action was incorrect. The matter was sent back to the collector in order that he might reliquidate, Judge Shipman, in his concurring opinion, saying there was "adequate data in the record and in the custom-house papers *to enable the collector to reliquidate with accuracy.*" *It was not to be presumed that there would be "any inherent difficulty in a reliquidation."*

After the decisions in the *Schroeder* and *Rosenwald cases*, it became apparent to counsel for Lies & Co. that they had fared better at the hands of the Board of General Appraisers than they would in the courts if the case were decided there upon its merits or with the collector if a reliquidation were had. In other words, the action of the Board of Appraisers, based on the *Blumlien Case*, could not be sustained under the law, as construed in the *Schroeder* and *Rosenwald cases*. *It therefore became the policy of opposing counsel to secure a judgment of the circuit court, but without a hearing on the merits, which would affirm the decision of the board, thus rendering it binding and conclusive upon the collector.* The dismissal of the application for review would throw the case back upon the decision of the board and admit of a reliquidation by the collector. On the other hand, a judgment by the

court would be conclusive against the Government and preclude a reliquidation. For this reason, on March 27, 1895, the importers, by their counsel, appeared before General Appraiser Sharpe and introduced the testimony shown in his report (Rec., p. 11), as follows:

NEW YORK, *March 27, 1895.*

Appearances:

For the importers: Curie, Smith & Mackie. (D. I. Mackie, of counsel.)

For the collector and Government: James T. Van Rensselaer, assistant United States attorney.

Mr. MACKIE. I offer in evidence the entry in this case by the *Rotterdam*, June 30, 1890, entry No. 104642, and the invoice and other papers accompanying the same or thereto attached with the exception of the protest.

Importers rest.

Adjourned without fixing date for further hearing.

Testimony closed.

Observe, that while the importers had the opportunity of introducing any evidence they had tending to show that the return of the appraiser or examiner, and the action of the collector, as to the character of the tobacco, was incorrect, they introduced no evidence whatever upon that point.

The court will note the situation at this point:

The importers had made application, under section 15 of the act of June 10, 1890, to the circuit court for a review of the questions of law and fact involved in the decision of the Board of Appraisers.

The court had ordered the board to return the record and the evidence taken, together with a certified state-

ment of the facts involved, and its decision thereon, and this had been done.

On application of the importers, the matter had been referred to General Appraiser Sharpe to take and return to the court such further evidence as either of the parties might desire to offer, and this had been done.

The matter was therefore in condition to be submitted to the circuit court, upon argument, and the statute enjoined the court to give priority to "and proceed to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification."

The Government, through the United States attorney, contended that the court, in the discharge of the duty imposed by this act, should proceed to hear and determine *all* the questions of law and fact involved in the matter before it, and should reverse the decision of the Board of General Appraisers for manifest errors therein; but the court, refusing to hear and determine the questions of law and fact involved in the decision of the Board of General Appraisers, nevertheless, upon the concession of the importers that there was no error in the decision of the Board of General Appraisers, *proceeded to affirm such decision in all things, and thus give it the strength of a judicial determination.* There was no dismissal of the application (or appeal, as the importers term it), but an affirmance of the decision. The following is the judgment (Rec. p. 12):

> The above cause *coming on for hearing and determination* before this court, on the application of

George P. Lies et al., composing the firm of George P. Lies & Co., importers, *for a review of the questions of law and of fact involved in the decision of the Board of General Appraisers* herein, and on the return of the Board of General Appraisers of the record and evidence taken by them, with their certified statement of the facts involved therein, together with their decision thereon, no petition for review of such decision of the Board of General Appraisers having been applied for by the collector or Secretary of the Treasury;

And the said George P. Lies & Co. having conceded in open court that there was no error in said decision of the Board of General Appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the Board of General Appraisers should be reversed for manifest error therein;

And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the Board of General Appraisers, because they had not proceeded under the statute to seek a review of such decison of the said Board of General Appraisers;

Now, after hearing W. Wickham Smith, of counsel for said importers, in support of the decision of said appraisers, and Wallace Macfarlane, United States attorney, in opposition thereto,

It is ordered, adjudged, and decreed that the decision of the Board of General Appraisers *be and the same is hereby in all things affirmed.*

(Signed) HOYT H. WHEELER.

The cause came on for hearing and determination on the record and evidence. The importers having conceded

there was no error in the decision of the board, the court held that the Government could not be allowed to impeach it, because it had not filed an application for its review, and thereupon adjudged that the decision be in all things affirmed.

From this judgment and decree the United States appealed to the circuit court of appeals, which, in an opinion delivered by Lacombe, judge (Rec., p. 18), affirmed the judgment of the circuit court, refusing to consider the case on its merits, and affirming the decision of the Board of Appraisers because the importers conceded it to be correct.

ARGUMENT.

I.

The power to collect revenue by levying duties is a sovereign right. In the exercise of this right Congress is, of course, subject to the limitations fixed by the Constitution. The agencies selected to collect the revenue, and the mode in which these agencies operate, must not contravene the Constitution; but, subject to these limitations, Congress has full power in the premises.

It is a fundamental principle that property can not be taken without due process of law. For this reason, in the collection of customs duties, a method is provided by which a dissatisfied importer may appeal to the courts and have a judicial determination of the questions of law and fact involved. The mode of review in court thus provided is ample to satisfy the requirements of the Constitution. The preliminary summary method, through

agencies of the Government intrusted with the duty of collecting its revenue, is wholly within the discretion of Congress, subject, of course, to the rule that the principle of equality must be observed.

In the leading case of *McMillen* v. *Anderson* (95 U. S., 37) it was held that the provision of the Louisiana law, that a person against whom taxes are assessed may enjoin their collection and have their validity determined, constitutes due process of law.

This Court, speaking by Mr. Justice Miller, said (p. 41):

> The mode of assessing taxes in the States by the Federal Government, and by all governments is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.
>
> But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.

The taxing laws of both Federal and State governments provide usually for a method of revision in the first instance by taxing officers before an appeal to the courts, whether by injunction or other proceeding, is warranted. In the appraisement of property for taxation under the laws of the different States, taxing tribunals, with authority to review and correct, are usually provided. Ultimately a resort may be had to the courts, for these taxing tribunals are not and can not be vested with

judicial power. They exercise simply discretion and judgment, or, as it is termed, quasi-judicial power. The judicial power can only be vested, under our various constitutions, in the courts.

The same method has been followed by Congress in the laws providing for the collection of customs duties. Opportunity has always been afforded the importers to appeal to some superior customs officer or officers for a review and correction of the errors of subordinates, and ultimately a resort to the courts has been provided.

Thus, section 2930, Revised Statutes, and the thirteenth section of the customs administrative act, which supersedes it (see Appendix), provide for a review of the appraisement made by the appraising officer; in other words, for a reappraisement.

Section 2931, Revised Statutes, and section 14 of the customs administrative act, which supersedes it (see Appendix), provide for a protest and appeal from the action of the collector in classifying the imported goods and fixing the rate and amount of duties. Section 2931 provided for an appeal from the collector to the Secretary of the Treasury; section 14 provides for an appeal to the Board of General Appraisers. Both the Secretary of the Treasury and the Board of General Appraisers are customs officers of the Government. While each acts in a quasi-judicial capacity, exercising discretion and judgment, neither is a court.

The resort to the court, in order to constitute due process of law, was regulated under the old law by sections 3011 and 3012, Revised Statutes (see Appendix), which

have been superseded by section 15 of the customs administrative act. Sections 3011 and 3012 provided for a suit to recover back duties alleged to have been erroneously or illegally exacted by the collector; while section 15 provides for an application to the circuit court to review the questions of law and fact involved in the decision of the Board of General Appraisers.

No suit to recover back could be brought under sections 3011 or 3012 by an importer unless a protest had been filed by him with the collector, and an appeal taken to the Secretary of the Treasury under section 2931; and no application can be filed in the circuit court for a review of the questions of law and fact involved in the decision of the Board of General Appraisers, unless the importers have duly appealed from the action of the collector to the Board of General Appraisers, under section 14. The statutes in existence before the passage of the customs administrative act have been repeatedly before this court, and it has been held that they carried only such relief to the importers as Congress deemed it expedient to grant. While they gave the importer the right to protest against the decision of the collector, to appeal to the Secretary of the Treasury, and then to carry his case into the courts by a suit to recover back, the Government on its part was not precluded from availing itself of all its rights at any stage of the proceeding.

The collector and the Secretary of the Treasury were Government officers charged with the collection of customs revenue, and in the court, after the suit to recover back was brought, the Government might introduce any defense

calculated to sustain the action of the collector or the Secretary of the Treasury. In other words, the Government was not required to define its position while the matter pended before either the collector or the Secretary, for the reason that they were Government officers. It was only necessary, when a case came on for hearing in court, to introduce such defense as might then appear expedient.

In a broad sense all this is true of the present customs administrative act. The remedy by protest to the Board of General Appraisers, under the fourteenth section, is a remedy granted the importer, just as the appeal to the Secretary of the Treasury, under section 2931, was a remedy granted the importer. The decision of the Secretary, under section 2931, was made final and conclusive against the importer, unless he carried his case into the courts. So, the decision of the Board of Appraisers, under the fourteenth section, is made final and conclusive "upon all persons interested therein, unless the matter is carried into the circuit court in the mode provided in the fifteenth section.

The action of the Secretary of the Treasury under section 2931, and the action of the Board of General Appraisers under the fourteenth section, in each instance is the decision of a special customs tribunal which represents the Government, and is final and conclusive as against the importers, unless the matter is carried into the courts. The only difference is that section 14 substitutes the Board of Appraisers for the Secretary of the Treasury, as provided in section 2931, Revised Statutes.

Under section 15, either the importers or the Government, acting through the collector or the Secretary of the Treasury, may carry the case into the courts. But in both instances, under the old law and under the present law, when the case has been carried into the courts, the whole case, so far as it concerns the Government, remains open, the only limitation being that the importers are entitled to such relief only as is covered by their protest.

The case of *Erhardt* v. *Schroeder* (see Appendix) was a case under the old law. Compare it with the case before the court. In the *Schroeder Case* the decision appealed from was one by the Secretary of the Treasury; in the present case the decision sought to be reviewed is one by the Board of General Appraisers. In each case, a decision of the special Government tribunal, the Secretary of the Treasury, or Board of General Appraisers, was conclusive against the importers unless the case was carried into the courts. In both cases, when the matter was carried into the courts, the Government was free to introduce its full defense, and the courts to consider the case on its merits, and, if just and proper, send the matter back for reliquidation by the collector.

II.

After comparing generally the old law and the new, regulating the review of the action of the collector, and an appeal, if necessary, to the courts, it may be of service to analyze the provisions of the existing law

The scheme of appraisement, of liquidation, and of review marked out by the customs administrative act of June 10, 1890, is as follows:

The importer makes his entry and files his declaration as to the value of the goods (sec. 5). The appraiser ascertains the actual market value and wholesale price of the merchandise in the principal markets of the country whence imported (sec. 10). This the appraiser returns to the collector (sec. 13). If objected to, a reappraisement may be obtained, first by the general appraiser and then by the Board of General Appraisers (sec. 13). If not objected to, or after reappraisement, it becomes the duty of the collector to ascertain, fix, and liquidate the rate and amount of duty to be paid (sec. 13). If the importer is dissatisfied with the decision of the collector as to the rate and amount of duties he may protest, and the action of the collector comes for review before the Board of General Appraisers (sec. 14).

The decision of this board is final and conclusive as against the importer unless an application be filed in the circuit court for a review of the questions of law and fact involved in such decision (sec. 14). In case an application is filed in the circuit court "*for a review of the questions of law and fact*" involved in the decision of the Board of General Appraisers, the record and the evidence taken by the board, together with a certified statement of the facts involved in the case and their decision thereon, is returned to the circuit court, and then the case is referred to one of the general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered; and such further evidence,

with the returns from the Board of General Appraisers, "*shall constitute the record* upon which said circuit court shall give priority to *and proceed to hear and determine the questions of law and fact involved in such decision* respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final," unless the case is carried to a higher court (sec. 15).

It is to be observed—

First. The protest under the fourteenth section is limited to the importer; the Secretary of the Treasury, if dissatisfied with the action of the collector, does not protest, but directs a reliquidation under sections 249, 251, 2652, and 2949 of the Revised Statutes, and section 21 of the act of June 22, 1874 (18 Stat., 186).

Second. That the application to the circuit court, under the fifteenth section, is not an appeal from a decision of the Board of General Appraisers in a contested matter before it, *but the institution of what is really an original proceeding in the circuit court, to review all the questions of law and fact involved in the decision of the board.* And these questions are not decided simply upon the record which was before the board, but there is a provision for the trial of the case, as an original matter, by the circuit court, the record and evidence before the board being treated as competent evidence before the court, but provision being made for the introduction of new and additional evidence before the circuit court on behalf of both parties, importers and Government.

The fourteenth section [see Appendix] provides "that the decision of the collector as to the rate and amount of

duties" upon imported merchandise "shall be final and conclusive against all persons interested therein," unless the importer shall, within the time fixed, "give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reason for his objections thereto." Upon such notice the collector is required to transmit the invoice and all the papers and exhibits to the Board of General Appraisers, "which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector, * * * who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court" under section 15.

The decision of the collector "as to the rate and amount of duty chargeable upon imported merchandise" is made "final and conclusive against all persons interested therein," unless the importer protests and carries the case to the board. It is evident that the phrase, "against all persons interested therein," used near the beginning of the fourteenth section, refers to the persons interested in the merchandise, for only such persons can protest and carry the case to the Board of General Appraisers. The decision of the collector is not final and conclusive as against the Government, for the collector, on his own motion, or by direction of the Secretary of the Treasury, may reliquidate at any time within one year. (*Beard* v. *Porter*, 124 U. S., 4–37.)

Near the close of the fourteenth section it is provided that the decision of the board "shall be final and conclusive upon all persons interested therein" unless an application for review is filed in the circuit court under the fifteenth section. For the reasons stated, it is manifest that the decision of the collector is only conclusive as against "all persons interested" in the merchandise—that is, against the importers; whether the decision of the Board of Appraisers, upon a protest, is final and conclusive "upon all persons interested" in the case—that is, upon the collector and Secretary, representing the Government, as well as upon the importers—is a disputed question, which does not, however, affect the decision of this case, whatever view the court may take of it.

The contention of the importers is that the decision of the board is conclusive against the Government, unless the Government, through the collector or Secretary, makes an application for a review by the circuit court under the fifteenth section. In support of this, they point to the provision, near the close of the fourteenth section, that the decision of the board shall be final and conclusive "upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, unless an application be filed in the circuit court." Also to the provision, near the beginning of the fifteenth section, that if the collector or Secretary is dissatisfied with the decision of the board, he may, within thirty days thereafter, apply to the circuit court for a review.

On the other hand, the Secretary of the Treasury has taken, and still takes the view, that whether the case is or is not carried before the board by a protest of the importers, the right to reliquidate, for the purpose of assessing higher duties, in a proper case, where an error is discovered in the original liquidation, remains with the Secretary of the Treasury, as heretofore, under sections 249, 251, 2652, and 2949 of the Revised Statutes, and section 21 of the act of June 22, 1874. (*Beard* v. *Porter*, 124 U. S., 437.)

The exercise of this right to reliquidate, because of errors discovered in the original liquidation, does not deprive the importers of any right granted for their protection by the existing customs administrative law. The right to protest against the action of the collector in reliquidating would remain (*Robertson* v. *Downing*, 127 U. S., 613), and the ultimate result would be that the decision of the board, upon the case as it really existed, would be followed, unless the matter was carried to the court upon an application for review. The Secretary of the Treasury, of course, does not contend that the collector has a right to ignore and disregard the decision of the Board of Appraisers upon a protest, but only that he has a right, within the time limited by the statute, to reliquidate and asesss higher duties because of errors in the original liquidation discovered subsequent thereto.

But whether the right to reliquidate, after a decision by the board under the fourteenth section, does or does not exist, the final and conclusive character of the deci-

sion of the board, under this section, is limited to cases *where no application for a review is "filed in the circuit court within the time and in the manner provided for in section 15."* The fourteenth section provides that the decision of the board shall be final and conclusive "upon all persons interested therein," and the collector shall liquidate the entry accordingly, but expressly excepts all cases where an application for review is filed in the circuit court under section 15. *The filing of the application for review, no matter by whom, whether by importer or by Government, supersedes the decision of the board, and suspends its operation, and leaves the matter open until the court finally decides the case thus originally presented to it.*

Section 15 provides, that if the importer or the collector, or the Secretary of the Treasury shall be dissatisfied with the decision of the board, under section 14—

> *as to the construction of the law and the facts* respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises *for a review of the questions of law and fact involved in such decision.* Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and facts complained of, and a copy of such statement shall be served on the collector or on the importer [&c.] as the case may be.

This gives the collector, as well as the importer, the right to apply to the circuit court. The applicant is

required to file "a concise statement of the errors of law and fact complained of," and serve a copy on the opposite side; *but the application is not for a review of the errors of law and fact thus complained of, but for "a review of the questions of law and fact involved in such decision."* Upon the filing of the application, whether by the importer or the collector, and the making of service, the circuit court obtains jurisdiction of the case for the purpose of a full review and a final and conclusive determination.

It will be observed that no provision is made for the filing of any answer or counter application by the other side. After the case gets into the circuit court, *it is a matter not of pleading but of procedure.* The duty of the court with respect to the case is marked out plainly by the statute, which proceeds:

> Thereupon the court shall order the Board of Appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said circuit court.

Thus, the entire record upon which the Board of Appraisers acted in rendering its decision is brought before the circuit court. For what purpose? Not simply to review the errors complained of, but to review all the questions of law and fact involved in the decision.

In order that both sides may have ample opportunity (from whichever side the application came) to present the

entire case to the court for its complete and conclusive decision, the statute proceeds as follows:

> And within twenty days after the aforesaid return is made, the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, *to take and return to the court such further evidence as may be offered* by the Secretary of the Treasury, collector, importer, [etc.] within sixty days thereafter * * * ; and *such further evidence, with the aforesaid returns, shall constitute the record* upon which said circuit court shall give priority to and *proceed to hear and determine the questions of law and fact involved* in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.

The case being before the court, each side, by this reference, is afforded the opportunity to introduce further evidence, and after the evidence is all in, the circuit court is enjoined to give priority to and proceed to hear and determine the questions of law and fact involved in the decision. The application is not treated as an *ex parte* proceeding. The filing of it is simply the method provided for the institution of a suit in the circuit court. When it is filed and served the whole case is before the circuit court. The record and evidence before the Board of Appraisers is returned, and a reference made, so that each party may introduce any additional evidence he may deem expedient. Then the court is enjoined to give priority to the case and determine all the questions of law and fact involved.

The judgment of the circuit court is made final and conclusive unless the case is carried to a higher court, the statute providing:

> The decision of such court shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless, etc.

Following the provision for an appeal to this court (now superseded by the provision for an appeal to the circuit court of appeals), the section provides that "on such *original application*, and on any such appeal," security shall be given. The appellate court is given jurisdiction—

> to review such decision, and shall give priority to such cases, and may *affirm, modify, or reverse such decision* of such circuit court and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

It is to be noted that while the circuit court is given jurisdiction "to hear and determine the questions of law and fact" involved in the decision of the Board of Appraisers, the appellate court is given jurisdiction to review the decision of the circuit court, "and may affirm, modify, or reverse such decision." The statute recognizes the application to the circuit court as an "original application," and the appeal to the higher court as an "appeal."

In conclusion, it is provided:

> All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section 23 of this act.

This may serve to explain why the importers were so solicitous in the present case to obtain a judgment of the

circuit court, being unwilling to dismiss their application and rest upon the decision of the Board of Appraisers.

III.

The application for review in the circuit court is not an appeal or a proceeding in error to review a judicial determination made by the Board of Appraisers. It is an original application to the circuit court to review the ministerial act of a special customs tribunal charged with quasi-judicial functions and the exercise of discretion and judgment in the execution of the customs laws.

The fact is to be kept carefully in mind, that the collection of the revenue of the Government is not a judicial but an executive act regulated by legislative enactment. The judicial power of the Government can only be vested in the courts. The Board of Appraisers is composed of customs experts. It is not a court, but an agency of the Government for the more summary collection of its revenues. Under every system of taxation there are not only the officers charged with the preliminary duties, but revising officers and boards charged with the duty of reviewing and correcting the action of their subordinates. The customs administrative act created the Board of General Appraisers, not as a court, but as an effective revising agency of the customs department, which, in a summary manner, could revise and correct the errors of the appraisers, examiners, and collectors.

The proceeding before the Board of Appraisers is not a judicial one between private parties respecting prop-

erty or personal rights, but a matter between the Government acting through its agents, and the citizen. In order to afford the citizen every opportunity of being dealt with justly and lawfully, the application for review to the circuit court is provided. This application does not regard the proceeding before the board as a judicial one from which error can be prosecuted or an appeal taken. It could not. In the case of *Musser* v. *Adair* (55 O. S., 466) an attempt was made to prosecute error to the common pleas court of Ohio from a decision of the auditor placing certain property upon the duplicate for taxation.

The supreme court of Ohio, citing the case of *Logan Branch Bank, ex parte* (1 O. S., 433), held that the court could not entertain a proceeding in error; that such a proceeding is in the nature of an appeal, and invokes appellate jurisdiction, and an appeal can only be taken from one court to another. The auditor did not act as a court, but a mere agent of the State in enforcing its tax laws.

IV.

The application provided for by section 15 of the customs administrative act is a statutory action, and of course must be governed by the provisions of the statute regulating it. At the same time a reference to the cases of *United States* v. *Ritchie* (17 How., 525) and *Grisar* v. *McDowell* (6 Wall., 363), arising and decided under the California land claims act, may be of service to the court.

The act of March 3, 1851 (9 Stats., 632), "to ascertain and settle the private land claims in the State of California," provided, in its ninth section, that after a decision

of the board of land commissioners either party could "present a petition to the district court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim."

This section was repealed in the following year by section 12 of the civil and diplomatic appropriation act of August 31, 1852 (10 Stats., 99), which provided that in every case in which the board of commissioners should render a final decision a transcript should be filed with the clerk of the district court, and that the filing of such transcript should "*ipso facto* operate as an appeal for the party against whom the decision shall be rendered." A copy of the transcript was to be transmitted to the Attorney-General. It was further provided:

> And if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk aforesaid within six months thereafter of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney-General, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States; and *on a failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed.*

The tenth section of the act of 1851 provided:

> The district court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court.

In *United States* v. *Ritchie* (17 How., 525, 535) this court, speaking by Mr. Justice Nelson, said:

> It is also objected that the law prescribing an appeal to the district court from the decision of the board of commissioners is unconstitutional, as this board, as organized, is not a court under the Constitution, and can not, therefore, be invested with any of the judicial powers conferred upon the General Government. (*American Insurance Company* v. *Canter*, 1 Peters, 511; *Benner* v. *Porter*, 9 How., 235; *United States* v. *Ferreira*, 13 How., 40.)
>
> But the answer to the objection is that *the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court.* The transfer, it is true, is called an appeal. We must not, however, be misled by a name, but look to the substance and intent of the proceeding. *The district court is not confined to a mere reexamination of the case, as heard and decided by the board of commissioners, but hears the case de novo upon the papers and testimony which had been used before the board, they being made evidence in the district court, and also upon such further evidence as either party may see fit to produce.*

These remarks apply forcibly to the application for review under section 15 of the customs administrative act. The circuit court is not confined to a mere reexamination of the case as heard and decided by the Board of Appraisers, but hears the case *de novo* upon the record and evidence returned by the board, that being made competent evidence in the circuit court, and also upon

such further evidence as either party may see fit to produce before the appraiser to whom the matter is referred.

In the case of *Grisar* v. *McDowell* (6 Wall., 363) the plaintiff claimed the land by a conveyance from the city of San Francisco. The defendant claimed to hold it as an officer of the United States. The board of commissioners decided partly in favor of San Francisco and partly in favor of the United States. Accordingly, under the act of 1852, the transcript of the decision filed with the clerk of the United States district court operated *ipso facto* as "an appeal" for both parties. Each party filed a notice of intention to prosecute the appeal. The Attorney-General, however, by a formal notice and stipulation, dismissed the appeal of the United States. It was insisted, upon the argument, that the dismissal of appeal by the United States debarred it, upon the hearing of the city's appeal, from asserting its own claims. Upon this point the court, speaking by Mr. Justice Field, expressed itself as follows (pp. 374–375):

> The appeal was by statute for the benefit of the party against whom the decision was rendered; in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed—and both parties gave notice of their intention to prosecute the appeal. Subsequently, in February, 1857, the Attorney-General withdrew the appeal on the part of the United States, and in March following the district court, upon the stipulation of the district attorney, ordered

that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. The counsel of the plaintiff contended that this decree closed the controversy between the city and the United States as to the lands to which the claim was confirmed. But in this view they are mistaken. *Had the city accepted the leave granted, withdrawn her appeal, and proceeded upon the decree as final, such result would have followed. But this course she declined to take. She continued the appeal for the residue of her claim* to the 4 square leagues. *This kept open the whole issue with the United States.* The proceeding in the district court, though called in the statute an appeal, was not in fact such. It was essentially *an original suit, in which new evidence was given and in which the entire case was open.*

After quoting from the opinion in *United States* v. *Ritchie*, *supra*, the learned justice proceeded (pp. 375, 376):

The dismissal of the appeal on the part of the United States did not, therefore, preclude the Government from the introduction of new evidence in the district court or bind it to the terms of the original decree.

The authorities cited by counsel to show that when only one party appeals from a decree in a California land case the other party can not urge objections to the decree or insist upon its modification have no application. They are adjudications made in cases of appeal from the district court to the Supreme Court where the case is heard on the record from the court below and where error upon the record alleged by the appellant is alone considered, or in cases where an attempt has been made upon supple-

mentary proceedings on a survey of the land confirmed to deviate from the terms of the original decree.

As pointed out before, the importers did not dismiss or withdraw their application for review, and content themselves with resting upon the decision of the Board of Appraisers. For their own purposes, even after the decisions in the *Schroeder* and *Rosenwald cases*, they desired a judgment of the circuit court, and proceeded with that end in view to introduce additional testimony before General Appraiser Sharpe, have such testimony returned to the court, and have a hearing and determination by the circuit court. Such hearing and determination, of necessity, under the express language of the statute, was of all the questions of law and fact involved in the decision of the board.

The court could not hear and determine these questions without according the Government the opportunity to be heard upon them, *under the law and the facts as presented to the court*, not under the law and facts as presented to the Board of Appraisers. And the court could determine these questions only in accordance with the law and the facts before it. The court can not be bound by the contention or concession of one party against the protest of the other when once the case is submitted to it upon the law and the facts. Suppose that, on the hearing before the circuit court, additional evidence should be introduced, showing conclusively that the decision of the Board of Appraisers, which the importers alone had made application to have reviewed, was clearly

erroneous, but not in the particular contended for by the importers.

Suppose it should be shown beyond doubt, by the additional testimony, that the goods were of a character requiring classification under a paragraph imposing a higher duty than that under which the board classified them. Would the Government lose the benefit of this showing because it had not filed a counter-application? Would the court be compelled either to sustain the contention of the importers, and classify the goods under a paragraph imposing a lower rate than that found by the board, or else affirm the decision of the board? In other words, is it possible that the court, after the record and additional evidence have been brought before it, is powerless to do justice between the Government and the importers, and render a decision in accordance with the law and the facts?

The only reason for holding as the lower courts did in this case is the existence of the rule as to protests *which applies only to importers.* It is true that the importer is limited to the specific claim set out in the protest. But the protest is required by section 14. The Government is not required to protest. The importers alone are required to protest. The presumption is in favor of the regularity and validity of the action of the Government officers. The importer who is dissatisfied must point out the particular grounds of his objection.

There is no provision for a protest under the fifteenth section. The importer who carries his case into the courts under that section does it at his peril. He runs the risk

of getting less than the board has given him when he applies to the court for a review of the entire matter. He does not carry the case to the court upon certain exceptions, or upon certain questions of law presented in a record. While he is required to make a statement of the errors of law and fact complained of, he applies for a review of all questions of law and fact involved in the decision. He presents an "original application," and must abide a decision of the court upon the entire case as presented to it.

V.

An abstract of the cases upon the subject of the classification, under paragraphs 246 and 247, of Sumatra leaf tobacco,—the *Falk Case*, the *Soby Case*, the *Blumlein Case*, the *Schroeder Case*, and the *Rosenwald Case*,—is printed as an appendix to this brief. A reading of these cases will satisfy the court that if the circuit court had deemed itself free to enter into the merits and decide the questions of law and fact involved in the decision of the Board of General Appraisers, it would have reversed that decision and remanded the case, either with directions to affirm the action of the collector or send the matter back to the collector with instructions to reliquidate, under the law as construed by this court in the *Schroeder Case*.

The decision of the board was based upon the *Blumlein Case*, and can not be supported except upon the theory that that case is still authority upon both the decided points, namely, that the bale is the unit and that

the 85 per cent applies to weight as well as to size and fineness of texture.

It sufficiently appears from the record that all the tobacco was Sumatra leaf; that it was of uniform grade, and therefore of size and texture fit for wrappers. It does not appear what would be the result if the weight test laid down by this court in the *Schroeder Case* had been applied. Following the rule then in vogue, the examiner treated the 85 per cent as applicable to the weight test. He examined each representative hand separately. He then divided the bale and the lot it represented into 75-cent or 35-cent tobacco in accordance with the result of his application of the weight test to the individual representative hand.

If one hand ran more than one hundred leaves to the pound, one-tenth of the bale and of the lot it represented was put down as 75-cent tobacco. He did not make an examination of the ten hands collectively, as he should have done under the Schroeder decision. He did not bunch the ten hands and ascertain how, on the average, the leaves ran with respect to weight. Such an examination might have shown that *all* the tobacco was dutiable at 75 cents. The hands taken as indicating 75-cent tobacco may have contained leaves so light in weight as to more than overbalance the heavier leaves contained in the hands which were taken as indicating 35-cent tobacco, if the statutory test had been applied to the general collection of all the representative leaves, irrespective of their casual association in the respective hands.

For these reasons it does not appear, and the importers did not show, either before the Board of General Ap-

praisers or the circuit court, that the tobacco returned by the collector as dutiable at 75 cents was not of the character and grade described in paragraph 246.

It is respectfully submitted that the judgments of the circuit court of appeals and the circuit court should be reversed and the case remanded to the circuit court with instructions to enter a judgment reversing the decision of the Board of General Appraisers.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 15, 1898.

APPENDIX.

REAPPRAISEMENT.

SEC. 2930. If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector in writing of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly.

PROTEST AND APPEAL TO SECRETARY AS TO DUTIES.

SEC. 2931. On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry as to the rate and amount of duties to be paid on the tonnage of such vessel, or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive *against all persons interested therein*, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied

on tonnage, or the owner, importer, consignee, or agent of such merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of customs, as well in cases of merchandise entered in bond as for consumption, *give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto*, and shall, within thirty days after the date of such ascertainment and liquidation, *appeal therefrom to the Secretary of the Treasury. The decision of the Secretary* on such appeal shall be *final and conclusive;* and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, *unless suit shall be brought within ninety days* after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal, in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

PROTEST AND APPEAL AS TO CHARGES.

SEC. 2932. The decision of the respective collectors of customs as to all fees, charges, and exactions of whatever character, other than those relating to the rate and amount of duties to be paid on the tonnage of any vessel,

or on merchandise and the dutiable costs and charges thereon, claimed by them, or by any of the officers under them, in the performance of their official duty, *shall be final and conclusive against all persons interested in such fees*, charges, or exactions, unless the like notice that an appeal will be taken from such decision to the Secretary of the Treasury shall be given within ten days from the making of such decision, and unless such appeal shall actually be taken within thirty days from the making of such decision; and the decision of the Secretary of the Treasury shall be final and conclusive upon the matter so appealed, unless suit shall be brought for the recovery of such fees, charges, or exactions, within the period as provided for in the preceding section in regard to duties. No suit shall be maintained in any court for the recovery of any such fees, costs, and charges, alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless such decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

SUITS TO RECOVER BACK DUTIES.

SEC. 3011. Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, *may maintain an action* in the nature of an action at law, which shall be triable by jury, *to ascertain the validity of such demand and payment of duties*, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest [*in writing, and*

signed by the claimant or his agent, was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed] [and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one].

BILL OF PARTICULARS.

SEC. 3012. No suit shall be maintained in any court *for the recovery of duties alleged* to have been erroneously or illegally exacted by collectors of customs unless the plaintiff, within thirty days after due notice of the appearance of the defendant, either in person or by attorney, serves on the defendant or his attorney *a bill of particulars of the plaintiff's demand*, giving the name of the importer or importers, the description of the merchandise, and place from which imported, the name of the vessel, or means of importation, the date of the invoice, the date of the entry at the custom-house, the precise amount of duty claimed to have been exacted in excess, the date of payment of said duties, the day and year on which protest was filed against the exaction thereof, the date of appeal thereon to the Secretary of the Treasury, and date of decision, if any, on such appeal. And if a bill of particulars containing all the above-mentioned items be not served as aforesaid, a judgment of non pros. shall be rendered against the plaintiff or plaintiffs in said action.

CUSTOMS ADMINISTRATIVE ACT OF JUNE 10, 1890.

(26 Stat., Chap. 407, 131, 137.)

SEC. 14. That the *decision of the collector* as to the rate and amount of duties chargeable *upon imported merchandise*, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive *against all*

persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, "but not before," such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port, or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive *upon all persons interested therein*, and the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accordingly, *except in cases where an application shall be filed in the circuit court* within the time and in the manner provided for in section fifteen of this act.

SEC. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, *they or either of them*

may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, *for a review of the questions of law and fact involved in such decision.* Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall order the Board of Appraisers to return to said circuit court *the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon;* and all the evidence taken by and before said appraisers *shall be competent evidence* before said circuit court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court *such further evidence as may be offered* by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and *such further evidence with the aforesaid returns shall constitute the record* upon which said circuit court shall give priority to and proceed *to hear and determine the questions of law and fact involved in such decision* respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and *the decision of such court shall be final*, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case said circuit court, or the judge making the decision, may, within

thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed on the part of the United States whenever the Attorney-General shall apply for it within thirty days after the rendition of such decision. *On such original application* and on any such appeal security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases, *and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly. All final judgments,* when in favor of the importer, *shall be satisfied and paid by the Secretary of the Treasury* from the permanent indefinite appropriation provided for in section twenty-three of this act. For the purposes of this section the circuit courts of the United States shall be deemed always open, and said circuit courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases as they shall deem proper.

CASES ON THE CLASSIFICATION OF SUMATRA LEAF TOBACCO.

Falk v. *Robertson* (137 U. S., 225), November 24, 1890; Blatchford, judge.

An action at law in the supreme court of New York to recover back the duties paid under protest on leaf tobacco imported into New York from Holland in January and April, 1884. Due protest and appeal.

Tobacco imported in bales. Eighty-three per cent of the contents of each bale was leaf tobacco, dutiable at 75 cents under paragraph 246, act of March 3, 1883; the remaining 17 per cent was inferior tobacco, called "fillers." The 75-cent tobacco was Sumatra tobacco.

The other tobacco was separated from it by strips of paper or cloth, the bale being repacked in Holland for the purpose of reducing the wrapper tobacco below 85 per cent per bale.

The court held that under these circumstances the bale was not the unit upon which the 85 per cent was to be calculated; but that, the wrapper tobacco being separable, it would be treated as a unit, and 85 per cent of it being of the description dutiable at 75 cents, the whole of the wrapper tobacco was so dutiable.

Middle page 232:

> "The statute does not refer to tobacco in bales. It does not say that the 85 per cent is to be 85 per cent of the contents of a bale; but the duty of 75 cents per pound is imposed upon any quantity of leaf tobacco of the specified quality and weight, if not stemmed. * * * The unit is not the bale, but is the separated quantity of such leaf tobacco. That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was, evidently, only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market. It appears from the testimony of one of the plaintiffs that, prior to the act of 1883, the bale of Sumatra tobacco that was known and dealt in was a bale containing about 160 or 170 pounds of that tobacco, and inferior tobacco was not imported in the same bale with such Sumatra tobacco. The unit of the statute, therefore, must be held to be leaf tobacco wrappers answering

the description which, when reaching the named percentage, is subject to the duty of 75 cents a pound."

Soby v. *Hubbard, collector* (49 F. R., 234), January 27, 1892; C. C. district of Connecticut; Shipman, judge.

Action to recover back from the collector at Hartford duties paid under protest on an importation of Sumatra tobacco from Amsterdam in June, 1890. Soby purchased from Shroeder 100 bales of Sumatra leaf tobacco, to be used for wrappers, shipped first from Holland to New York, and thence without appraisement to Hartford. The invoice consisted of two plantation lots, one of 43 bales and one of 57 bales. The tobacco in the lot was of uniform quality. Upon the entry of the goods in Hartford the two lots were separately examined, weighed, and appraised by the appraiser. Five bales of the first, or "Lankat," lot and 6 bales of the second, or "Senembah," lot were examined. Ten hands were drawn from different parts of each bale. The hands were separately weighed and the leaves in each counted. No examination as to size or fineness of texture was made.

As to the Lankat lot, the appraiser reported 93¼ per cent, or 6,941 pounds, at 75 cents per pound, and the remainder, 460 pounds, at 35 cents per pound. As to the Senembah lot, the appraiser reported 83 and a fraction per cent, or 8,194 pounds, at 75 cents per pound, and the remainder, 16 per cent and a fraction, or 1,622 pounds, at 35 cents per pound. The duty was paid on the Lankat lot and it was withdrawn, so that no question arises with respect to it. The duty on the Senembah lot, according to the return of the appraiser, was paid under protest, and suit brought to recover it back.

Held: That since only 83 per cent of the Senembah lot was 75-cent tobacco, the whole lot was dutiable at 35 cents a pound.

At page 236:

> "The facts in this case are very different from those in the Falk Case, but the idea which the court gives of the proper unit upon which calculation is to be made is also applicable to different states of fact. The unit is the separable and separated quantity of leaf tobacco wrappers of substantially uniform grade. *A whole invoice, fairly packed, and consisting of one grade or lot might be a proper unit.* When the invoice consists of two or more separate lots of different grades it can not be the unit. When bales are falsely packed, or the tobacco is fraudulently admixed with "filler" tobacco, or two classes of tobacco are presented in one bale, the leaf tobacco in wrappers, answering the statutory description in each bale, is, as in the Falk Case, properly the unit. In this case, there were two separate lots, all the tobacco was for wrappers, the lot in question was of uniform grade, and there was no fraudulent admixture of inferior tobacco. *I am of opinion that the proper unit was the quantity of tobacco in the Senembah lot.*"

In re Blumlein (55 F. R., 383); April 18, 1893; C. C. Appeals, second circuit; Lacombe, judge.

Blumlein imported from Amsterdam into New York 37 bales of unstemmed Sumatra leaf tobacco, consisting of three lots, containing 10, 18, and 9 bales, respectively. As a result of the examination made the collector decided that there was in the 10-bale lot 20 per cent of 75-cent tobacco; in the 18-bale lot, none; in the 9-bale lot, 60 per cent. Duty was accordingly assessed upon 20 per cent of the 10-bale lot, and 60 per cent of the 9-bale lot, at 75 cents per pound, and on the residue at 35 cents per pound. The importers appealed to the Board of General Appraisers, protesting that the entire importation was subject to duty only at 35 cents per pound. The

Board of General Appraisers, *pro forma*, sustained the collector; thereupon the importers appealed to the circuit court, which reversed the decision of the board and of the collector, and directed that the tobacco should be classified at 35 cents a pound. From this judgment the Government appealed.

Held: First. That the unit upon which the percentage is to be calculated is the bale; if it be of uniform quality, and if 85 per cent of the examined bale, and, therefore, of the lot it represents, is not 75-cent tobacco, under paragraph 246, the entire bale and the lot it represents is dutiable at 35 cents a pound.

Second. The 85 per cent clause does not refer merely to size and fineness, but to size, fineness, and weight.

Page 385:

> "When this kind of tobacco is packed at the place of production, the leaves are first tied together in packages called hands. The number of leaves in the hand varies. Sometimes the hand contains less than 20, sometimes more than 50, but the general average of leaves is about 35 to 40. From six to seven hundred of these hands are then packed in a bale. * * * A bale varies in weight from about 160 to 190 pounds."

Page 386:

> "In our opinion the statute does not authorize any such method of classification. It plainly contemplates the importation of tobacco of mixed grades, and provides that when it is thus mixed, and 85 per cent of it is of the higher grade, such mixed lot shall pay 75 cents per pound on all tobacco therein contained, whether of higher or lower grades. If the lot does not contain 85 per cent of the higher grade, the entire lot is to pay the lower duty. * * *
>
> "Commercially speaking, the aggregation of leaves of tobacco into the bale, however, is permanent. The

package thus formed remains unbroken, as in the course of trade it passes from hand to hand till it reaches the consumer. To that unit (the bale) any importation of tobacco can be reduced without difficulty. Below that unit it can not be reduced without commercially changing its condition."

Page 387:

"In the case at bar none of the bales examined contained 85 per cent of the higher grade. The collector was satisfied from his examination that the bales not examined conformed in all respects to the selected sample bales, and there is nothing before us to show that any of them contained the requisite percentage. None of the tobacco, therefore, came within the provisions of paragraph 246 or the decision of the Supreme Court in the Falk Case, for upon examination there was not found any 'separable and separated quantity' of leaf tobacco of which it could be said that 85 per cent was of the requisite size, fineness, *and weight* to be dutiable at 75 cents per pound.

"The appellant further contends that the 85 per cent clause refers only to size and fineness. We do not so read the statute. Though awkwardly expressed, its evident meaning is that leaf tobacco 85 per cent of which is of the requisite size, fineness, *and weight* is dutiable at 75 cents per pound."

Hubbard, collector, v. *Soby,* (55 F. R., 388); April 18, 1893; C. C. Appeals, second circuit.

The facts in this case are stated in the report of the case in the circuit court (*supra*). The judgment of the circuit court was affirmed, the court saying:

"In the case at bar the learned circuit judge held that the 'quantity of tobacco in the Senembah plantation lot' was the proper unit. Examination of

his opinion, however, discloses the fact that such holding was based on the proved fact that all the bales in the lot were of uniform grade. Where all the bales in a lot are thus uniform, the same result is reached, whether lot or bale be taken as the unit."

Erhardt v. *Schroeder* (155 U. S., 124). November 12, 1894. Shiras, judge.

Action in the superior court removed to the United States circuit court of New York, to recover back duties collected on an importation of leaf tobacco from Amsterdam, received November 5, 1888. The invoice consisted of 429 bales described as Sumatra tobacco. On the trial the inquiry was limited to 10 bales, upon 9 of which the importers paid duty at 75 cents a pound and upon 1 of which they paid duty at 75 cents on 125 pounds and 35 cents upon 54 pounds. In other words, upon this one bale the importers paid 75 cents a pound on 70 per cent of it and 35 cents a pound on the balance. They contended they should have been compelled to pay but 35 cents a pound on the entire 10 bales. The importers protested against the action of the collector, appealed to the Secretary of the Treasury, who decided against them, and then brought suit under section 3011, Revised Statutes.

On the trial the collector asked that the case might go to the jury upon the question whether there had been a proper examination made of the bales in controversy, claiming that, although there was not 1 bale in 10 sent to the public stores, there were only 10 bales in question, representing four plantation lots, and as 4 bales representing those 10 bales had been examined at the public stores, there was a sufficient compliance with the statute. The court refused to submit this question to the jury, and directed a verdict for the importers. The judgment was reversed and the case remanded for a new trial.

Held: First. On the contention of the importers that section 2939 requires that not less than 1 bale in 10 should be examined, *that the burden is on the importer to overcome the presumption of a legal collection by proof that the exaction of the duties was unlawful.*

Second. As to the character of the tobacco made dutiable at 75 cents a pound under paragraph 246, *the 85 per cent applies only to the size and fineness of texture of the half leaves*, and *the requirement as to weight has reference to the average number of leaves in the quantity of tobacco examined.*

Page 130:

> "In this view it is apparent that the usual presumption of a legal collection is not changed by the circumstances of this case, and *that the burden is upon the importer of overcoming this presumption by proof that the exaction of the duties was unlawful.*"

Page 133:

> If, then, a bale or other separate and concrete quantity of leaf tobacco contained only leaves of such uniformity of character as to be, in their collective form, of one class, *the bale*, or other separate collection, *would be the unit* contemplated in the percentage and weight tests of paragraph 246. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class.

Bottom page 133, and page 134.

> "All the tobacco in question in this case, as the evidence on both sides shows, was raised in the same country, and was all of the class known to the trade as wrappers. Therefore, *any bales, or, indeed, the whole invoice*, if it might conveniently be treated as a whole for the purpose, *was just such a unit* as was

intended by the statute. Any other view of this legislation would make it meaningless, for the very term 'per cent' implies an understanding that the tobacco to be taxed, even though of a uniform grade, may contain some leaves possessing and some not possessing the qualifications required for the higher tax. In such a case, if separate hands, taken from a bale containing only leaves of one class, were treated as units, the result might be an inaccurate conclusion.

"Doubtless in the hands classed as containing tobacco dutiable at the lower rate there would be leaves having all the requisites of the higher grade, while in the hands ascertained to be taxable at the higher rate would be leaves of the lower grade. This might have the effect of making a division of tobacco of one commercial class into two grades with respect to taxation—a division which we do not believe to have been contemplated by the statute. *If the character of the tobacco is to be learned from an examination of a representative quantity therefrom, such as ten hands, the hands should be separated and the statutory tests applied to the general collection of all the representative leaves, irrespective of their casual association in the separate hands.*"

Top page 136:

"The most natural interpretation of the paragraph in question is to consider eighty-five per cent of half leaves, or suitable half leaves eighty-five in number out of half leaves one hundred in number as the requirement, and to regard the proportion of the weight of the suitable half leaves to the weight of all the leaves as immaterial.

"A further requirement of the act is that the leaves of the collection must be of such average lightness that more than one hundred are required to weigh a

pound; that is to say, if the collection should weigh 160 pounds it must contain more than 16,000 leaves; or if some smaller collection, taken as representative of the whole, such as ten hands, should weigh 4 pounds, this representative collection must contain more than 400 leaves. Here we are not to have in view, as in the other test, the separate parts of the leaves, for the language of the act expressly provides for the condition that '100 leaves are required to weigh a pound.' The word *leaves* plainly means leaves in their natural state, or whole leaves."

"Assuming that the importers, in testifying concerning the size and fineness of texture of tobacco, had in mind the proper test when speaking of the percentage of the surface suitable for wrappers, we must take their evidence to mean that only five of the ten bales in controversy contained tobacco of which less than 85 per cent fulfilled, as to the size and fineness of texture, the demands of paragraph 246. It would seem, therefore, that the court below was in error in directing a verdict for the importers, and that the judgment of that court ought to be reversed, and the case remanded with directions to set aside the verdict, and to order a new trial, in order that a jury may pass upon the real character of the tobacco contained in the 10 bales withdrawn by the importers."

United States v. *Rosenwald* (67 F. R., 323); March 5, 1895; C. C. Appeals, second circuit, Wallace, judge:

Appeal from judgment of the circuit court reversing a decision of the Board of General Appraisers, which affirmed the decision of the collector classifying certain imported leaf tobacco. The importation consisted of 54 bales of Sumatra tobacco, 28 bales being from one plantation and 26 from another. Part of the tobacco was

classified by the collector as 75-cent tobacco and the rest as 35-cent. The importers protested, claiming all the tobacco to be dutiable at only 35 cents, because 85 per cent thereof was not of the requisite size, fineness, and weight. The 54 bales comprised 7 lots Of these, 2 contained more than 10 bales, and the others from 3 to 10 bales each. The collector designated for examination 1 bale out of each lot not containing 10 bales, and 2 bales out of each of the other lots.

The examiner drew from each bale ten hands. He ascertained by inspection whether the tobacco was of the requisite size and fineness necessary for wrappers. He then weighed the hands separately, to ascertain whether the leaves ran over or under one hundred to the pound. He divided the hands into two classes, one consisting of those in which the leaves were more than one hundred to the pound, and the other of those in which they were less. The bales and the lots they represented were divided into 75-cent and 35-cent tobacco, so many tenths as there were hands of 75-cent tobacco, and so many tenths as there were hands of 35-cent tobacco. The circuit court held that all the tobacco should have been subjected to a duty at 35 cents per pound, proceeding upon the theory that the examination was insufficient and did not show that any single bale was of a character to entitle it to be classified for duty at 75 cents a pound.

The court comments on the *Falk Case*, the *Blumlein Case*, and the *Schroeder Case*. The court says it does not understand that the *Schroeder Case* is antagonistic to the judgment in the *Blumlein Case* to the effect that the commercial bale is to be deemed the unit upon which the percentage of 85 per cent is to be found. After referring to the holding of the Supreme Court in the *Schroeder Case*, to the effect that section 2939 is not mandatory but permissive, and that in the examination of a representative quantity, such as ten hands, the statutory test should

be applied to the general collection of the representative leaves, irrespective of their casual association in the respective hands, the court reverses the decision of the circuit court, because it can be sustained only upon the theory that the burden was upon the Government to show that the classification of the tobacco was lawful, instead of upon the importer to show the contrary.

Bottom page 327:

> "It is to be presumed, unless the contrary is made to appear, that there was a sufficient examination of the tobacco to enable the collector to determine what percentage of the whole was suitable for wrappers and composed of more than 100 leaves to the pound. Whenever it is alleged by the importer that the collector has exacted a duty based upon an improper classification of merchandise, the burden of proof is upon him to prove the allegation. Where the classification of merchandise depends upon the existence of specified characteristics descriptive of its qualities, it is to be presumed, in favor of a correct classification, that those characteristics were found by the officers of the customs" (citing *Arthur* v. *Unkhart*, 96 U. S., 118).

Page 328:

> "In the present case, as in *Erhardt* v. *Schroeder*, the presumption of a valid classification is not overthrown by the fact that the examination was not of all the tobacco in all the bales of the different lots, nor of all the tobacco in the representative bales designated by the collector, nor because it was only of ten hands from the representative bales; and in this case, as was done by the court in that, the evidence must be considered to ascertain whether the importers have shown that the necessary percentage

of higher grade tobacco was not present in any of the bales in controversy. If there had been an examination of only the most superficial character, it would still be incumbent upon the importers to show that the tobacco was not of the requisite characteristics to support the classification. The only evidence to meet this burden is the testimony and report of the examiner, which shows that a method was pursued which was wholly inadequate to ascertain what percentage in any bale of tobacco consisted of the higher grade; not only because, as was observed in the opinion of the court below, the variances were too great, 'even in the tobacco from the same plantation, to warrant the assumption that the other fifty-nine sixtieths of the examined bale, as well as the contents of the unexamined bale, contained tobacco of both grades in the proportion found to exist in the trifling amount examined,' but also because it was sought to determine the percentage, not by aggregating the leaves in the whole number of hands examined, but by aggregating the hands containing the higher grade."

Page 329:

"It is not disputed that all the tobacco in all the hands examined was suitable for wrappers, in respect to size and necessary fineness of texture, but there is no legitimate evidence which enables us to determine whether the requisite percentage did or did not exist in any of the bales in controversy, aside from those wholly composed of the higher grade. So far as appears, the importers may have escaped with payment of less duty upon their importation than was actually due. Because the judgment of the court below can only be sustained upon the theory that the burden was upon the Government to show that the

classification of the tobacco in controversy was lawful, instead of upon the importer to show the contrary, we conclude that the judgment should be reversed. It is accordingly so ordered."

Shipman, judge, concurring opinion, page 329:

"The burden of proving the inaccuracy of the qualities of the tobacco with respect to size, fineness, and lightness of weight not having been successfully sustained by the importer, the correctness of the collector's estimate must be assumed; and there are, in my opinion, adequate data in the record and in the custom-house papers to enable the collector to reliquidate with accuracy in accordance with the rule that the commercial bale is the unit of classification. In the *Soby Case* (49 Fed., 234), and in the various reliquidations since the Blumlein decision, no difficulty was apparently found in the ascertainment from the custom-house documents of the proper amount of duty in accordance with the court's construction of paragraph 246. In my opinion, it is not to be presumed or supposed hereafter that there is any inherent difficulty in a reliquidation."